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June 6, 2007

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 29, 2007

Case Number: TSO-0465

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.<sup>1</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted an access authorization. As discussed below, I find that access authorization should not be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concerns.

The security concerns cited in the letter involve the individual's excessive use of alcohol and falsification on a Questionnaire for National Security Positions (QNSP). With respect to the individual's alcohol use, the letter cited a March 10, 1998

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1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

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evaluation by a DOE consultant psychiatrist. In a March 18, 1998 report to the DOE, the consultant psychiatrist concluded that the individual was suffering from alcohol abuse. The notification letter further pointed out that from 1997-1999, the individual was enrolled in out-patient alcohol/substance abuse counseling through an Employee Assistance Program (EAP), during which he was told that he may be suffering from the beginning of alcoholism. The notification letter also cites seven arrests or citations occurring during the period 1991-2001 involving alcohol use. These incidents included twice driving while intoxicated (DWI), driving with an open container, providing liquor to a minor, resisting arrest, and disorderly conduct after consuming alcohol. The letter also indicates that the individual admitted having gone to work with a hangover and having blacked out after drinking alcohol. According to the notification letter, this constitutes derogatory information under 10 C.F.R. § 710.8(j)(hereinafter Criterion J). <sup>2</sup>

The notification letter also states that in 1997, 2003 and 2004, the individual signed QNSPs certifying that he had not illegally used a controlled substance in the previous seven years. Moreover, in a 2000 QNSP, the individual stated that he used marijuana twice in 1993. However during a personnel security interview of May 30, 2006, the individual admitted he used marijuana twice a year from 1991 to 2001 and once in 2003. He further stated that he used cocaine twice, once in 1999 and once in 2000. The notification letter also reiterated the alcohol-related traffic arrests cited above, and a 1997 arrest for driving on a revoked license. The notification letter indicated that these incidents and the QNSP falsifications give rise to a security concern under 10 C.F.R. § 710.8(l)(Criterion L). That section covers behavior which tends to show that an individual is not honest, reliable or trustworthy, or which furnishes reason to believe that an individual may be subject to pressure, coercion, exploitation or duress, which may cause him to act contrary to the best interests of the national security.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a

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2/ Criterion J security concerns relate to an individual's use of alcohol habitually to excess, or to an individual's having been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

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hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his wife, his supervisor, his uncle, his brother, and an EAP counselor. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

## II. Hearing Testimony

### A. The Individual

With respect to his use of alcohol, the individual testified that he has abused alcohol and that it has created some serious problems for him in the past. Transcript of Hearing (Tr.) at 103. He recognizes that when he uses alcohol, he tends to use it heavily and then "gets into trouble." Tr. at 97. He indicated that in 1997, as a result of a court order, he stopped using alcohol and enrolled in alcohol counseling. Tr. at 105. The counseling program lasted six months, and during that period he also attended Alcoholics Anonymous (AA). He continued participation in AA for a total of about one year, and did not use alcohol at all for that period. Tr. at 92, 106, 118-19. However, he stated that after this one-year period he resumed alcohol use. He described his next alcohol-related incident, which took place in 2001 at his bachelor party the night before his wedding. Tr. at 94-95. He further indicated that the last time he used alcohol was at his brother's wedding in May 2005. Tr. at 116, 117. He indicated that he does not plan to use alcohol again because it does not promote a good life style and does not set a good example for his children. Tr. at 108, 109, 119-20.

The individual also testified about his illegal use of marijuana and cocaine. He indicated that his last illegal drug use was in 2003, when he used marijuana with some friends at a birthday party. He stated that altogether he used marijuana about six times during the period 1993 through 2003. Tr. at 153-154. The individual testified that he used cocaine once in the year 2000 and once in 1999. Tr. at 154-55.

The individual also discussed his false certification on his in 1997, 2003 and 2004 QNSPs that he had not illegally used a controlled substance in the previous seven years, and his false statement in a 2000 QNSP that he had used marijuana twice in the previous seven years, when he had used it about twice a year in that

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period. He stated "I don't know why I would have put 'no,'" regarding the 1997, 2003 and 2004 QNSPs. Tr. at 150. He pointed out that he did admit in a QNSP of January 2000 that he had used marijuana. With respect to why he might not have indicated his drug use, he further stated "The only thing I could say is I just didn't read the question right this time." Tr. at 151. He also testified, ". . . maybe my head wasn't right back then. I have no recollection of doing this, other than I did it." Tr. at 162. He testified, ". . . maybe I read the question wrong." Tr. at 163.

He further stated that he never told his brother about his use of illegal drugs. He also stated that he never told his uncle about his use of cocaine, although he believed his uncle may have been aware of his use of marijuana. Tr. at 173-74. He testified that he never told his wife about his cocaine use, but did reveal his marijuana use to her. Tr. at 175. He stated that he was ashamed of these incidents. Tr. at 174.

#### B. Individual's EAP Counselor

The individual's EAP counselor testified that he counseled the individual for his alcohol problems for about six months during 1998. The EAP counselor indicated that the counseling was a probation requirement imposed by a court after the individual's second DWI conviction. One component of the program was that the individual abstain from alcohol use during the probation period. Much of the counseling consisted of educating the individual about why he was drinking, helping to understand the nature of alcoholism and providing him with tools to cope with it. The counselor believed that one reason the individual was drinking excessively was because his friends engaged in binge drinking. He testified that the individual benefited from the counseling because he acknowledged his problem and was motivated to correct it. Tr. at 74-76, 80, 81. The EAP counselor testified that the 2001 alcohol incident was a relapse, showing a lack of judgment by the individual, but it did not necessarily mean that the individual should be considered a current alcohol abuser. Tr. at 86-87. Overall, the EAP counselor believed that the individual has been doing well for the past several years, and that the individual should continue to abstain from alcohol use. Tr. at 123-24.

#### C. Supervisor

This witness stated that he is currently the individual's supervisor and has known the individual and supervised him for about five years. He testified that the individual is a good worker, and a

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reliable performer who does not miss work very often. Tr. at 10-12, 13. He stated that the individual has never come to work under the influence of alcohol. Tr. at 12. He and the individual do not spend any time together outside of work. Tr. at 13. He was unaware of the individual's use of drugs and the individual's omissions/falsifications on the QNSPs. Tr. at 14-16. The supervisor was unaware of the individual's past problems with alcohol abuse. Tr. at 18, 20. He stated that the individual did not discuss with him the subject of the hearing, other than to say it involved a security clearance. Tr. at 19-20

#### D. Individual's Family

##### 1. The Individual's Uncle

The individual's uncle testified that he sees the individual weekly or bi-weekly, and that he and the individual spend time with each other and their families. Tr. at 23. He stated that since the individual has been married, he has changed considerably and over the course of that period he has reduced his alcohol consumption to very small amounts, if any. Tr. at 24, 28, 31. He stated that the last time he saw the individual drink alcohol was "a couple of years [ago]." Tr. at 27. This witness testified that with respect to the instant hearing, the individual only indicated to him that it involved his security clearance and previous DWI's. Tr. at 26. The individual never discussed with him his use of illegal drugs and he stated he did not know if the individual had ever used illegal drugs. Tr. at 29.

##### 2. The Individual's Wife

The individual's wife testified that she and the individual met at the beginning of 2001 and were married in September 2001. Tr. at 58. She stated that when she and the individual first began living together, about six years ago, they would drink "a few beers, but not a whole lot of drinking." Tr. at 59. She indicated that after the birth of their daughter in August 2005, the individual completely stopped drinking. Tr. at 59-60. She testified that the individual no longer socializes very much outside of his family, and that his priorities have changed since his marriage. Tr. at 62-63, 70.

She was aware that the individual had used marijuana and cocaine. She believed that his last marijuana use was "a few years ago." She indicated that the individual told her about his use of marijuana in 2003, just after it occurred. Tr. at 66-67. With respect to use

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of cocaine, the wife at first stated that the individual did not tell her about his use of cocaine, and that she learned of it about one month before the hearing through reading the record in this proceeding. Tr. at 67. She later testified that "he probably said something, and . . . I didn't register it." Tr. at 72.

### 3. The Individual's Brother

The individual's brother testified that he was aware of the individual's history of DWIs and the court-ordered counseling. Tr. at 35. He believed that the individual changed his behavior after he got married, and that his alcohol use has tapered off since his marriage. Tr. at 46. He noted that the individual spends his free time with his family. Tr. at 36-37. He sees the individual about twice every three weeks. Tr. at 46. The brother testified that the last time he saw the individual use alcohol was at his [the brother's] wedding in May 2005. Tr. at 47.

The brother testified that the individual never told him about his use of illegal drugs, and that he learned about it shortly before the hearing through discussions with the individual's attorney. Tr. at 49-51. He stated "all I know is that something came up on one of the forms. . . . he revealed it [illegal drug use] to the DOE several years after he had incorrectly omitted it from the questionnaires." Tr. at 53.

### E. The DOE Consultant Psychiatrist

After listening to the testimony of all the above witnesses, the DOE consultant psychiatrist confirmed that he diagnosed the individual with alcohol abuse in 1998. Tr. at 126. He was impressed with the wife's testimony to the effect that the individual has matured since he was married and he noted that the individual has taken on significant responsibilities by having three children. Tr. at 133. He noted that the individual's wife testified that she was sure that the individual had not used alcohol since August 2005, when their daughter was born. The DOE consultant psychiatrist was convinced that the individual had been abstinent at least since that time, for a total of about 20 months. The DOE consultant psychiatrist therefore believed that the individual had satisfied the one year of abstinence that he would recommend in this case. Tr. at 133-34. However, the DOE consultant psychiatrist stated he had a:

harder time than usual making an answer to the question of is there adequate evidence of rehabilitation or reformation partly because I haven't had a good chance to

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evaluate the evidence [and] to meet with him. I would have liked a urine/drug screen to see if there is some objective evidence to back up his statements that he's not using. I would have liked to have seen medical tests that I would usually do for signs of excessive drinking. . . . He's put in enough time-I have no reason to contest the sobriety date of August 2005, so he's put in enough time being sober, and he does seem to express today an acknowledgment that he did have a problem and a commitment to keep his sobriety. Those are all positives. I would feel better if there was some sort of treatment that he had done or some sort of partnership that he engaged in over these times, both for support to help him maintain sobriety, because it's very difficult and not many people can. If he's done a year and eight months of sobriety, he's up in the better than 90<sup>th</sup> percentile of people with alcohol problems.

Tr. at 133-35.

The DOE consultant psychiatrist would have liked the individual to have participated in AA with a sponsor during his recent abstinence period so as to provide some "emotionally uninvolved" corroboration of his abstinence. Nevertheless, he found the testimony of the individual's wife, uncle and brother to be reliable and useful on the issue of abstinence. Tr. at 136-37. Overall, he believed that the individual's abstinence for a period of nearly two years was very positive. He testified that the individual's risk of relapse in the next year was roughly 25 percent "because he's got a lot of good motivation in place, the trajectory seems good, and there is good evidence from his wife that he probably has been keeping sober." Tr. at 142.

### III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

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This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing* (VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

#### IV. Analysis

The first issue in this case is whether the individual has mitigated the Criterion J security concerns by demonstrating that he is reformed and/or rehabilitated from his alcohol abuse. A further issue is whether the individual has mitigated the Criterion L concerns regarding his falsification on the QNSPs and his numerous arrests. As discussed below, I find that the individual has resolved the Criterion J concern, but has not resolved the Criterion L security concerns.

##### A. Criterion J

I believe that the individual has been abstinent from alcohol since May 2005, the time of his brother's wedding. The individual's family members, his brother, wife and uncle, are in a very good position to confirm whether the individual has refrained from alcohol, as he maintains. Their positive testimony was especially persuasive. I note the small discrepancy regarding whether his abstinence dates from May or August 2005. While his wife could only be certain of his abstinence since August 2005, the date of the birth of their daughter, I am inclined to accept the individual's recollection on this issue. The individual's brother provided some corroboration on this point. In any event, I do not think that there is any intent to obfuscate on this point. There is no real benefit to the individual to do so. Either way, the individual has clearly exceeded by at least eight months the one-year abstinence period recommended by the DOE psychiatrist.



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I am also convinced that the individual will maintain his abstinence. I was impressed by the strong testimony of the individual's wife, uncle and brother that the individual is devoted to his family and that he has taken his family responsibilities very seriously. In this regard, the testimony in this case convinces me that the individual no longer associates with the friends with whom he formerly consumed alcohol, and devotes himself to family-related events and activities. I do not believe that the individual would jeopardize all that he has achieved and which he considers important in his life by resuming alcohol use, which he admits has frequently gotten him into trouble in the past. I am persuaded that the individual has a strong family support system, which will be of assistance to him if he ever does feel the need to use alcohol again. Given these circumstances, I believe that the DOE consultant psychiatrist's testimony to the effect that the individual is "in the better than 90<sup>th</sup> percentile of people with alcohol problems," and that there is approximately a 25 percent risk of relapse here is in the individual's favor. *Personnel Security Hearing*, 29 DOE ¶ 82,977 Case No. TSO-0410 (November 3, 2006) (in combination with other mitigating factors, less than 30 percent chance that individual will consume alcohol to excess in the next five years deemed sufficient to mitigate Criterion J security concerns). The combination of these factors in the present case augurs well for the individual.

Based on the above considerations, I find that the individual has resolved the Criterion J concerns set out in the notification letter.

#### B. Criterion L

Since, as discussed above, I find that the individual has mitigated the Criterion J security concerns related to his alcohol use, I also find that he has resolved the Criterion L security concerns that involved his alcohol-related arrests. Most of the remaining Criterion L security concerns here pertain to his falsifications on QNSPs, which as discussed below, are not resolved.

I find that the individual has not resolved the concern regarding his falsification of QNSPs about his use of illegal drugs. As an initial matter, I was not convinced by the individual's explanation of why he failed to fully reveal the drug use from the outset. He claimed he may have misread the question. I see nothing in the rather straightforward question, which asks whether an applicant has used illegal drugs in the previous seven years, that could be subject to misunderstanding, and the individual has not pointed out any reason that he could have been confused. Thus, this explanation does not seem candid. I also was unimpressed by the individual's

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assertion that he did not know why he falsified. Usually, applicants filling out a QNSP falsify because they fear that a correct answer will disqualify them from being granted a security clearance. I suspect that is what happened here. If the individual had simply testified that he feared admitting his drug use for this reason, I would be more inclined to believe that he is now being honest about his illegal drug use. As it is, I am left with the distinct impression that this individual is still unwilling to be completely honest about his illegal drug use.

This impression is confirmed by the fact that the individual was unwilling to discuss all the facts regarding this falsification and the drug use itself with his wife, uncle and brother. In contrast to the strong testimony from these witnesses that they were aware of the individual's prior use of alcohol and his current abstinence from alcohol, none of his witnesses knew the full extent of his illegal drug use or the falsifications until shortly before the hearing, if at all. See *Personnel Security Hearing*, Case No. TSO-0396, 29 DOE ¶ 82,966 (September 28, 2006)(individual's supervisor did not know of key facts regarding his use of illegal drugs and falsification until he came to hearing to testify). In fact, the individual testified that he was ashamed of his drug use and did not want to reveal it to his brother, who learned about it through discussions with the individual's lawyer. At the time of the hearing, the brother had only limited knowledge about the falsification issue, testifying that all he knew was that "something had come up on one of the forms." Tr. at 53. The individual's wife learned about the cocaine use and falsification only by reading the record of this case. The individual's uncle stated he knew nothing at all about the individual's drug use. The individual's supervisor also knew nothing about the falsifications or the drug use. See *Personnel Security Hearing*, Case No. TSO-0408, 29 DOE ¶ 82,986 (November 30, 2006)(individual informed witnesses, who were his friends and co-workers, about his past illegal behavior, not just in contemplation of his security clearance hearing, but well before, as part of his natural, ongoing interaction with them). I find that the individual's overall lack of candor on this point with those family members closest to him, and with his supervisor, and further in his own testimony at the hearing itself, raises significant concerns about his willingness to be honest with the DOE in the future about derogatory information. He has therefore not resolved the Criterion L security concerns.

#### V. CONCLUSION

As the foregoing indicates, I find that the individual has resolved the Criterion J security concerns, but has not resolved the Criterion L security concerns cited in the notification letter. It

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is therefore my decision that this individual should not be granted access authorization.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton  
Hearing Officer  
Office of Hearings and Appeals

Date: June 6, 2007